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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 84.

GEORGE C. HOPKINS, Collector of Internal Revenue,
Petitioner,
v.
C. W. BACON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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C. W. BACON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the trial court in this case is reported in 27 Fed. (2d) 140 (Bacon v. Hopkins). The opinion of the Circuit Court of Appeals is reported in 38 Fed. (2d) 651 (Hopkins v. Bacon).

JURISDICTION.

No question is made by Respondent as to the jurisdiction of this Court.

STATEMENT OF THE CASE.

The statement of facts in the brief of the Petitioner substantially covers the case presented, except the facts showing the departmental practice and construction of the Revenue Laws in question; the legislative history of the United States income tax laws bearing upon the questions here involved; and Congressional approval of the departmental practices and construction. Such omitted facts will be more fully presented in their appropriate settings in succeeding pages of this brief.

It is sufficient here to say with reference to such facts that the taxing sections of the Revenue Act here involved (the Revenue Act of 1926) duplicated corresponding provisions in earlier revenue laws, all of which, before the enactment of the 1926 Act, had been construed by the Treasury Department and divers Attorneys General of the United States as entitling husbands and wives to make separate returns of their separate interests in community income; and Congress, on several occasions, refused to make any change in legislation with respect to the matters here involved. (R. pp. 27-32.)

STATUTES INVOLVED.

The relevant constitutional and statutory material, national and local, will be found in the appendix (pp. 66 to 83).

THE QUESTION PRESENTED AND THE POSITION OF RESPONDENT.

The question presented is: Whether under the language and the settled departmental and Congressional construction of the Revenue Acts and under the laws of Texas, a husband and wife domiciled in Texas in the year 1927 had the right separately to report and to be taxed separately upon their respective shares of community income received in that year. Both of the lower courts decided they had such right.

(Note: This case is a test case made necessary by action of the Treasury Department taken pursuant to recommendations in the opinion of Acting Attorney General Mitchell rendered July 16th, 1927, 35 Op. Atty. Gen. 265.)

Respondent contends in support of the decisions of the lower courts:

First. The Revenue Act of 1926 taxed separately the net income of every individual. Also, with respect to husbands and wives, it affirmatively permitted each of them to make and be taxed upon separate returns. The statute itself, therefore, justified the separate returns made in this case.

Second. Under the Constitution and laws of Texas and the decisions of its highest courts, the community income here involved, upon which the Respondent alone was taxed in this case, belonged jointly and equally to him and his wife. Such Constitution, laws and decisions concerned matters of local property rights and the marital powers of Texas citizens, and are binding upon this court.

Third. Respondent and his wife each had in the community income here involved such ownership and

substantial rights as to authorize them under the Revenue Act separately to return and be taxed upon their respective shares thereof.

Fourth. The settled departmental and Congressional construction of the identical language of the successive Revenue Acts which preceded the 1926 Act was that the husband could not be required to return nor to pay taxes upon the wife's half of community income, and such construction became a part of the Act itself.

Fifth. It being settled law in 1927, binding upon this Court, that Respondent owned a part only of the aggregate community income received by him and his wife in that year, the taxation of Respondent upon his part thereof, plus that of his wife, as contended for by the Petitioner would violate the Federal Constitution.

ARGUMENT.

Brief of Argument.

1. The Revenue Act of 1926, like all of its predecessors, levied an income tax upon the "net income of every individual." Husbands and wives were expressly required to file separate returns of their own incomes, and to pay taxes separately, unless at their option their aggregate incomes were reported in a joint return. Thus wives were expressly recognized as taxable persons and we need only inquire what part of community income in Texas, as to wives, came within the term "net income of every individual."

2. All of the income upon which the Respondent herein alone was taxed being revenues from com-

munity property, compensation for the husband's services, and revenues from the wife's separate property, was common (community) income of the husband and wife under the Constitution and laws of Texas, and the Petitioner in his brief so concedes.

3. Under the Constitution and laws of Texas, as well as the unbroken line of decisions of the Supreme Court of Texas, this common income belonged jointly and equally to husband and wife. Their respective rights attached at the same moment; Texas courts hold that these rights were "perfectly equivalent to each other," present and vested; and that they continued so throughout the marriage and through all the mutations the property might undergo.

4. The holding that the wife was a present and equal owner in community income was coupled with and predicated upon statutes and decisions which afforded her all those substantial rights necessary to fulfill the fundamental conceptions of ownership. Those fundamental attributes present were:

(a) The entire community property was liable for all of the obligations of the wife, incurred before or after marriage, arising from contract, tort, or otherwise, with the sole exception that, as to contractual liabilities incurred after marriage (other than for necessaries) a part of the community property was not liable unless the husband joined in the execution of the contract. Petitioner has confused limitations upon the wife's contractual capacity with liability for her legal contracts.

(b) That portion of the community property which consisted of revenues from the wife's separate property and her personal earnings was expressly exempted from the husband's obligations and made subject to all her valid contracts.

(c) Since 1913 management and control of the property of married persons and their income has depended upon the source and character of the income. The wife's personal earnings and all revenues from her separate property, though community income, were under her exclusive control. Petitioner's suggestions to the contrary are predicated upon a fallacious conception of the Texas statutes and the effect of the amendment passed in 1927. The homestead was under the control of both. The husband's earnings and the accumulations other than from property under the control of the wife or her earnings were controlled by him. Regulations as to control were, and are, statutory and were, on several occasions, changed by the Legislature under Constitutional sanctions, authorizing the Legislature to define the rights of the spouses in their common property, thus demonstrating that control was not an attribute of ownership.

(d) In case of abandonment by the husband, or his incapacity, the wife acquired entire freedom of contract and the unrestricted power to manage, control and dispose of the entire community property. Such right has always existed.

(e) As to that part of the community property which was under his control, the husband acted as managing partner and was restricted to the

scope of the marital partnership. The discretion granted him, though broad for reasons of "public policy and social economy" did not permit him to make any disposition which resulted in a fraud on the wife's rights. The fraudulent result need not have been intended, as contended by Petitioner. The wife could, by injunction, have prevented such a disposition, and where the doctrine of innocent purchaser did not forbid, recover the property, or have reimbursement from the husband.

(f) The wife, whether she predeceased her husband or not, might dispose of an equal share of the community property by will in any way that she saw fit. The husband had a like right. Neither could make any testamentary disposition of the other's share binding upon such other. In intestacy, whether or not the wife predeceased her husband, one-half of tthe community property descended to her heirs-at-law. Her heirs were (1st) her children by that or any other marriage or their descendants, if any; (2nd) if none, the husband, if living, and if not (3rd) her surviving ancestors and collateral kindred. Rules of descent as to the husband's share were the same; the wife becoming the beneficiary of the descent of his property, in the absence of his children or their descendants, him surviving.

(g) Upon the death of the husband, the wife had the right to administer upon the entire community property in preference to the husband's representatives. Such right continued as long as she remained a widow, and if she remarried

and such new relationship was later terminated, she might at will, resume the administration. The rights of the husband were the same, except that his remarriage did not interrupt his administrative powers.

(h) Upon the death of the wife an inheritance tax was imposed by the state upon her one-half of the community property, whether it passed by her will or by descent to heirs. The same was true as to the devolution of the husband's share. The same was true in both cases as to the Federal estate tax.

(i) Upon divorce the spouses held community property as tenants in common unless the court granting the divorce divided it between them. In the proper exercise of its discretion, the court might award a larger portion of the community property to the more dependent spouse, usually the wife, but it could not divest the title to real estate. Such judicial power was not intended to be a limitation of the ownership of either spouse in community property. Such was evident from the fact that it extended to and was freely exercised by the courts, with respect both to the separate property of each spouse and to community property.

(j) While ordinary litigation respecting the community property was conducted by the husband and in his name, the wife was an actual party through representation and was bound as such and subject to all statutory restraints applicable to formal parties. Where necessary for

the protection of her rights in community property, she could sue her husband or litigate alone with third parties. Her allowable absence from the litigation was a privilege to her and not indicative of want of interest in her. Such appeared from the circumstance that her coverture must be advanced as a defense.

5. The relation of the spouses to the community property and their rights therein were very similar to those of partners. It is the cherished policy of the Texas courts to regard the relationship as a special or marital partnership. The system is best understood when viewed in that light. References to the trust theory in certain Texas decisions mentioned in Petitioner's brief raise no inconsistency between that theory and the partnership principle here mentioned. The trust references in each case were made in discussions of and with reference to record titles in one spouse or the other, the individual interest even in those cases being recognized as being equally owned by each spouse as asserted in the marital partnership cases.

6. Since the wife in Texas was, as above shown, the equal owner with her husband of community income, and since the Texas laws and decisions afforded her all of the substantial rights involved in the fundamental conceptions of ownership and since the Revenue Act of 1926 imposed the tax upon "the net income of every individual" whether the income was derived from a partnership or otherwise, and since the law expressly recognized the wife as a taxable person with the right to file a separate return; it necessarily

followed that she, and not her husband, was rightfully taxed upon her one-half of the community income.

7. The Treasury Department and the Attorney General in 1920 ruled officially that the rights of the wife in Texas in community income were of such a nature as that one-half thereof was her income within the purview of the taxing acts, requiring her to report it and pay taxes thereon and that the husband could not be required to report it and could not be taxed upon it. Such rulings were continued by successive administrations. Separate returns of community income are still accepted by the Treasury Department subject to the outcome of this test suit. The wife's ownership and rights with respect to community property have been substantially the same continuously since 1920.

8. Congress expressly approved and adopted the above mentioned construction of the Revenue Acts, when, in considering the 1921 and 1924 Acts, it rejected amendments particularly aimed at requiring the husband to report and pay taxes on the entire community income. In those Acts and the 1926 Act under consideration here, Congress readopted the identical taxing language which had been so construed. This showed conclusively that Congress did not intend to tax to the husband the wife's half of the community income. Such intention must govern.

9. Unless it can be and is determined by this court that, notwithstanding the Constitution and laws of Texas and the decisions of her courts, community income in Texas was, in fact, the net income of the

husband alone, the taxation to the husband of the entire community income both of himself and of his wife as a part of his income at progressive rates would render that portion of the statute complained of here unconstitutional, in that, (a) it would be, in part, a direct tax not based alone on the income of the person taxed and not apportioned, (b) the tax would be not geographically equal and uniform, and (c) the basis (that is, the adding of the wife's share of community income to his share of the community income, plus any separate income which he might have) would be so arbitrary and capricious as to constitute a taking of the taxpayer's property without due process.

First Contention.

The Revenue Act of 1926 taxed separately the net income of every individual. Also, with respect to husbands and wives, it affirmatively permitted each of them to make and be taxed upon separate returns. The statute itself, therefore, justified the separate returns made in this case.

There is no support whatever in the law for the statement made by Petitioner at page 17 of his brief, that "The family is the social and economic unit upon which the burden of the tax must fall." There is as little warrant for the deduction from that erroneous premise that the purpose of the Revenue Act is thwarted if married persons in Texas are taxed upon their community incomes while in other states where community incomes do not exist they are not taxed upon them.

Sections 210 and 211 of the Revenue Act of 1926

imposed a tax "upon the net income of every individual.'"[1]

Section 216 of the Act allowed credits and exemptions to "the head of a family or a married person living with husband or wife." It provided:

> "A husband and wife living together shall receive but one personal exemption * * * If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them."[1]

Section 223 of the Act provided for a return under oath by:[1]

> "Every individual having a net income for the taxable year of $3500 or over, if married and living with husband and wife, * * * If a husband and wife living together have an aggregate net income for the taxable year of $3500 or over, or an aggregate gross income for such year of $5,000 or over, (1) each shall make such a (separate) return, or (2) the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

The only sections of the Revenue Act which petitioner could claim imposed the tax here in controversy were sections 210 and 211. Taxation under those sections was limited to "the net income of every individual" separately considered and was confined in each case to the net income of the taxed individual. The tax here involved was, in fact, imposed under such sections.

[1] Set out in full in appendix pp. 66-67.

The sections mentioned did not extend to nor provide for taxing several individuals jointly for an income in which such several individuals had fractional interests, nor for taxing any one of such individuals for his own share plus the shares or interests therein owned by persons other than himself.

Other sections of the Revenue Act extended to and taxed, under defined circumstances, certain specified aggregate incomes, such as the income of unincorporated associations,[1] the income of estates and some trusts,[2] and, formerly, the income of partnerships.[3] Such aggregations were taxed as aggregates, however, only because their taxation as aggregates was affirmatively and accurately provided for under sections of the act involved in this case, other than those relied on by Petitioner in this case.

Therefore, since the income taxed in this case was not, in its entirety, the net income of Respondent, but partly his and partly his wife's, it was not taxable in its entirety to him under sections 210 and 211, or any other sections of the Act, and since such income was not the income of an association or trust or any other aggregation specifically provided for in the Revenue Act, it was not taxed as a unit by any other provisions of the law.

The Revenue Act itself in several of its sections affirmatively recognized the wife to be a taxable subject[4] and in section 223 affirmatively provided for the right of husbands and wives in all the states either to make separate returns, each reporting and each

[1] Sec. 2 (a) (2), Sec. 230, Revenue Act of 1926.
[2] Sec. 219. Revenue Act of 1926.
[3] Excess Profits Tax of 1917.
[4] Sec. 216. Appendix, pp. 66-67.

being taxed for his or her individual income, unless, at their option, they elected to aggregate their incomes and return them and have them taxed as one income. The option given so to do was an option given to taxpayers and was not conferred upon or reserved to the Government.[1]

This option is comparable to a similar option[2] given by the Act to affiliated corporations or associations to file a joint return but was, of course, only availed of in those cases where it would reduce the tax. Even partnership income was not taxed as an aggregate under the 1926 Act, although, in certain earlier revenue acts, such incomes were so taxed. On the contrary, the 1926 Act affirmatively provided for an informational return as to partnership incomes, but for taxes to be laid only upon each partner's "distributive share, whether distributed or not, of the net income of the partnership."[3] In all respects it treated each partner's share of the income of a partnership in the same manner as his individual income exclusively proceeding from his own exertions or from his own property.

The taxing language in the 1926 Act of the sections which have been referred to has been substantially identical in the various successive revenue acts which, first passed in 1913,[4] have from time to time since

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[1] Cf. *Rose vs. Grant*, 39 Fed. (2nd) 340; *Buttolph v. Com.*, 29 F. (2d) 695; *Alameda Investment Co. v. McLaughlin*, 33 Fed. (2d) 120.

[2] Sec. 240, Revenue Act of 1926.

[3] Sec. 218, Revenue Act of 1926. Appendix page 67.

[4] Secs. 210, 211, 216, 223, Revenue Act of 1924;
Secs. 210, 211, 216, 223, Revenue Act of 1921;
Secs. 210, 211, 216, 223, Revenue Act of 1918;
Sec. 1 (a), (b), 7 (a), 8, Revenue Act of 1916;
Sec. 1 (a), (2), C. and D., Revenue Act of 1913.

been reenacted. Since 1914 the tax agencies of the Government consistently have recognized the separate taxability of the wife's income[1] and since 1920 have affirmatively ruled that the husband could not be required to return or be taxed upon the wife's share of community income.[2]

Second Contention.

Under the Constitution and laws of Texas and the decisions of its highest courts, the community income here involved, upon which the Respondent alone was taxed in this case, belonged jointly and equally to Respondent and his wife. Such Constitution, laws and decisions concerned matters of local property rights and the marital powers of Texas citizens, and are binding upon this court.

It is conceded by Petitioner in his brief in this case that all of the income here involved was the community income of Respondent and his wife under the Constitution and laws of Texas and the decisions of the highest Texas courts, and that the interest of each—husband and wife—was "vested" and not "expectant." It is insisted however that the wife was not entitled to return separately and to be taxed separately upon her share of it, and it is insisted by Petitioner that the husband may be taxed not only for his share of the income but for his wife's share also.

Petitioner's contentions just stated place Respondent under the necessity of outlining to this court the constitutional and statutory provisions and the

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[1] Treasury Decision No. 2090, Treasury Decision No. 2137.
[2] Treasury Decision No. 3071, 3 C. B. 221.

Texas decisions which show the real, actual, vested, substantial and present nature of the wife's ownership of her equal share of community income.

The present Constitution of Texas (in force since 1876), refers to "all property, both real and personal of the wife,"[1] and provides that "laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property *as that held in common with her husband,*" thus clearly recognizing the wife's ownership of community property as well as her ownership of separate property. Pursuant to the Constitution, laws were passed at an early date defining "the rights of the wife in relation * * * to * * * property * * * held in common with her husband."

Under the Texas Constitution and laws, all acquisitions of either husband or wife during marriage, whenever or however derived, were and are the *common* and equal property of both of them, except such acquisitions as came through "gift, devise or descent," and except the "increase" of lands so derived (that is, derived through "gift, devise or descent") and increase of lands owned at marriage or acquired subsequent to marriage through "gift, devise or descent."[2] "Increase" of lands referred to means not crops, rents, etc., produced from such lands, but physical accretions to such lands or their appreciations in price when sold.[3]

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[1] Sec. 15, Art. 16. Texas Constitution. Appendix page 68.

[2] Arts. 4613, 4614, 4619. Texas Statutes (Appendix pp. 74, 76. *Arnold vs. Leonard,* 114 Tex. 535.

[3] *Arnold vs. Leonard,* 114 Tex. 535; *Dixon vs. Sanderson,* 72 Tex. 359.

It is obvious that neither husband nor wife can have any incomes other than their community incomes, except such rare gains as are "increase" of lands. Legislative attempts to enlarge the wife's separate income have been held unconstitutional by the highest Texas courts.[1]

Virtually all imaginable acquisitions of either husband or wife in the shape of income are community income—the wife's personal earnings, crops from her lands, dividends on her stocks, interest on her money and increase of her live stock. The same is true as to corresponding acquisitions of the husband. The social policy of our people has been to deal exact, even-handed and equal justice to husband and wife recognizing them to be in all substantial respects equal marital partners.

Such is briefly expressed in the following statements of the Supreme Court of Texas:

> "Their rights of property in the effects of the community are perfectly equivalent to each other."[2]
>
> "Her right in that property (community property) is equal to that of the husband."[2]
>
> "Under the law as now settled by the former decisions of this Court, the titles of the husband and wife to the community are equal."[3]
>
> "In this state the beneficial interests of the husband and wife in community property are

[1] *Arnold vs. Leonard, supra; Northern Texas Traction Co. vs. Hill,* 297 S. W. 778; *Teague vs. Fairchild,* 15 S. W. (2nd) 585 (Com. of Appeals.

[2] *Wright vs. Hays,* 10 Tex. 129.

[3] *Zimpleman vs. Robb,* 53 Tex. 274-282.

> equal, whether the grant or deed to the property be in the name of only one of them or to them jointly.'"[1]

A very recent expression of the Supreme Court upon the subject is:

> "These conclusions harmonize with the conception underlying the Texas decisions that the wife's capacity to own and hold property is as complete as that of the husband; that each marital partner owns an estate in the community property equal to that of the other partner."[2]

In the decision last quoted from, the Supreme Court of Texas cited and quoted from two important decisions of this court: *Warburton vs. White,* 176 U. S. 484; *Arnett vs. Reade,* 220 U. S. 311.

These long established rules of property were expressly recognized and followed by the United States Circuit Court of Appeals in this case, and were followed in *Bek vs. Miller,* 8 Fed. (2nd) 797. The same rules were approved by this Court in a case appealed from the State of Washington case, *Buchser vs. Buchser,* 231 U. S. 157.

The Supreme Court of the United States has always recognized the binding effect of decisions of the state court establishing rules of property and interpreting local constitutions and statutes affecting property, marital relations, and the powers of citizens over

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[1] *Burnham vs. Hardy Oil Co.,* 108 Tex. 555-564.

[2] *Arnold vs. Leonard,* 114 Tex. 535. A few of the many holdings to the same effect; *Taylor vs. Murphy,* 50 Tex. 291; *Patty vs. Middleton,* 82 Tex. 586; *Wheat vs. Owens,* 15 Tex. 242; *Routh vs. Routh,* 57 Tex. 589; *Jones vs. State,* 5 S. W. (2nd) 973; *Kirkwood vs. Domnau,* 80 Tex. 645.

property and income within the state. A very late expression of the Supreme Court on the subject is:[1]

> "Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state court. For that reason, Federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts. (Citing cases) * * * But where the rule is one affecting title to real estate within the state and has been repeatedly determined by decisions of said courts, so that it is established as the law of the state, there has been no departure from the rule that the Federal courts will follow the decision of the state courts (citing cases), and this is the rule, even though the state rule is not approved."

Third Contention.

Respondent and his wife each had in the community income here involved such ownership and substantial rights as to authorize them under the Revenue Act, separately to return and be taxed upon their respective shares thereof.

It seems to us convenient to discuss this contention in connection with Petitioner's assertions concerning the laws and decisions underlying this contention, which immedately follow.

Petitioner asserts that the wife's alleged ownership is insubstantial and unreal and not such as to entitle

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[1] *Hines Yellow Pine Trustees vs. Martin*, 268 U. S. 458, 464. Also *DeVaughn vs. Hutchinson*, 165 U. S. 566, 570; *U. S. vs. Loan and Building Co.*, 278 U. S. 55.

her separately to return and be taxed upon her one-half of community income. Petitioner relies upon six points. Apparently he concedes or actually admits that all other attributes of ownership in the wife existed. His six points are:

(a) *That the husband alone has unrestricted power to contract, litigate concerning, and dispose of community property; except that he may not give it away with deliberate intent to defraud his wife.*

(b) *That community property and the husband's separate property are all liable for community debts incurred by the husband.*

(c) *That the wife is without power to contract or litigate concerning community property, except where the husband abandons her or is insane.*

(d) *That the wife cannot obtain a division of community property except in divorce proceedings, and then is without assurance that she will receive her one-half of community property.*

(e) *That a surviving husband's responsibility as community administrator are greater than the surviving wife's responsibilities in similar circumstances.*

(f) *That the husband's powers over community property and income, under Texas laws, are as substantial as under California laws.*

Respondent submits that the points made by the Petitioner are not correct in fact or law when tested

by the Constitution and laws of Texas and the decisions of her courts, and that, when they are brought under the acid test of comparison with the body of our laws, what little fragments as remain of the points, are, themselves, fairly trivial and insubstantial.

This Court has not agreed with Petitioner that the wife's interest in community property and income is negligible. On the contrary, it has said, *Arnett vs. Reade,* 220 U. S. 311:

> "It is very plain that the wife has a greater interest than the mere possibility of an expectant heir, for it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for alienation made in fraud of her by her husband. * * * We should require more than a reference to * * * as to the power of the legislature over an inchoate right of dower to make us believe that the law could put an end to her interest without compensation consistently with the Constitution of the United States."

and again in *Warburton v. White,* 176 U. S. 484:

> "The argument is that the provision in the statute giving the administration and disposition of the community property to the husband operated to destroy the community system and to render it impossible under the statute for community or common property to exist. In other words, the interpretation relied upon asked us to say that, because of a provision which merely pointed out how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about

> a result which was contrary to its express language providing for the existence of the community system."

As pointed out elsewhere in this brief, the Texas courts have not agreed with petitioner as to the insubstantial nature of the wife's title and interest in community property and income.[1] In a very recent case (*Atkins v. Davis,* 291 S. W. 968), a Texas Court of Civil Appeals declared that the nature of her title and interest was such "as brings her estate within the well recognized definitions of a freehold estate." The courts of both sovereignties have elaborately pointed out that powers of management and control are simply social machinery for the administration of family property and income and are distinct from matters of title, ownership and estate.

Arnold v. Leonard, 114 Tex. 535. (Quoting with approval *Warburton v. White, supra.*):

> "The Legislature could as well have provided that the wife could convey as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of conveyance did not alter the status of ownership. It could not make the interest of either spouse in community land greater or less."

Continuing, the Texas Supreme Court in that decision said that the Legislature

> "could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and

[1] See pp. 16 to 18 hereof.

> portions of the community which were derived from the use of the wife's separate property or from her personal exertions."

An admirable statement of the principle is found in an Idaho case (*Kohny vs. Dunbar,* 21 Idaho 258):

> "The statute therefore, intends that all property acquired by either the joint effort of the two members of the community or their individual and separate effort shall constitute a community fund and estate. The lawmakers evidently thought it wise and expedient in the interest of business and commercial transactions that this community have a business and managing agent * * * The statute, however, has given to the husband no better or higher title to the community property than it has given to the wife."

It is not correct to say, as asserted by Petitioner, that the husband alone has unrestricted power to contract and litigate respecting community property and unrestricted power of disposition, except that he may not give it away with the deliberate intent to defraud his wife.

A correct statement is that, in ordinary circumstances, the husband has the right as agent of the community to make contracts and to control litigation affecting *certain items,* and certains items only, of community income, and to convey *certain items,* and certain items only, of community property, except, however, that he may not dispose of it under circumstances which, regardless of his intent, would operate to defraud the wife of her community interest therein.

The community agency powers over community property and income are distributed by the Texas statutes between the husband and wife; the husband's powers being limited, (a) to his personal earnings, and (b) to income from his separate property; the wife's powers being, in like manner, limited, (a) to her personal earnings,[1] and (b) to income from her separate property.[2] If such separate items of community income become indistinguishable through voluntary commingling or mutations, the husband's ordinary powers extend to the commingled mass.

It appears correctly to be admitted by Petitioner that the 1925 Code did not operate to disturb the foregoing distribution of powers between husbands and wives, but he asserts that an amendment made by the Legislature in 1927 to Art. 4619 of the Code.[3] (adding to the language of that statute, as it already existed, a provision relative to the wife's powers in case of her being abandoned by the husband) must be construed as destroying all other Code provisions which gave the wife community agency powers over her earnings, and income from her separate property.

The amendment in question became effective about midyear 1927. Its purpose simply was to provide machinery by which the wife in case of the husband's

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[1] The Petitioner's contention that the wife does not have control of her personal earnings is effectively refuted by *In re Gutierrez*, 33 Fed. (2nd) 987 (Texas) and authorities there cited.

[2] Arts. 4613, 4614, 4616, 4617, 4620, Texas Statutes, pp. 74 to 76. Appendix. *Gohlman, Lester & Co. vs. Whittle*, 114 Tex. 548; *Tannehill vs. Tannehill*, 171 S. W. 1050.

[3] Acts of 40th Legislature (1927), Chap. 148, page 219. Appendix page 81.

disappearance and unknown whereabouts, might make proof of the facts to a court and be substituted completely for him in general management of community business. The caption so stated, the body of the Act so stated, and no attempt was made in the amendment to qualify or modify in any respect the other provisions of the Code, which, by continuing the legislation of 1913, 1917 and 1921,[1] distributed the community agency powers between husband and wife. The amendment would be limited to the new matter stated in the caption, under the Texas Constitution.[2] It would be limited to the new matter at which it was obviously aimed, under common and well recognized principles of statutory construction.

Petitioner insists that his view that this statute destroyed all of the wife's community agency powers provided for in the 1925 Act and in the laws passed in 1913, 1917 and 1921, must be adopted, else that an ambiguity is created. His position is, substantially, that if the legislature had desired to restore the wife's right to manage and control the rents, interests and dividends from her separate estate, it would no doubt have done so. Such rights of the wife, however, already existed before the 1927 amendment to Art. 4619. They needed no restoration.[3] It is Petitioner's contention which would create a conflict and produce the "ambiguity" and, taking his contention at its face, a pla. ambiguity would be created between that section as reenacted and other

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[1] See History of Texas Statutes on subject. Appendix pp. 69 to 73. *Gohlman, Lester & Co. vs. Whittle*, 114 Tex. 548. *Arnold vs. Leonard*, 114 Tex. 535.

[2] *Arnold vs. Leonard, supra.*

[3] *Gohlman, Lester & Co. vs. Whittle*, 114 Tex. 548. See, also, *Beaver-Electra Refining Co. vs Cauble*, 115 Tex. 1.

sections of the statute which freed the wife's earnings and the revenues from her separate property from liability for community obligations created by the husband.[1] There are no decisions supporting Petitioner's interpretation of the 1927 amendment. And there are express decisions and statutes recognizing the exemption of such income from liability for the husband's debts and subjecting it to her debts (*Gohlman vs. Whittle*, 114 Tex. 548, Art. 4614 Tex. Rev. Stat.) The statute has been held to give her "complete management and control" of her personal earnings. (*In re Gutierrez*, 33 Fed. (2nd) 987).

That the contractual powers of the husband were solely an agency, so far as the wife's one-half interest in community property and community income were concerned, is demonstrated by the consequences upon his powers, of his abandonment of the wife or of his insanity. In either case, she became the managing agent of the community. It was never contended that her succession to the agency would operate to destroy the husband's ownership of his one-half of the community property and the community income. His rights continued throughout his absence or incapacity just as hers continued throughout his presence and agency activities for their common benefit.[2]

The Petitioner contends that the sole limitation upon the husband's agency power was that he might

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[1] Arts. 4616, Texas Statutes. Appendix 75.

[2] *Wright vs. Hays*, 10 Tex. 129; *Zimpleman vs. Robb*, 53 Tex. 274, Acts of 40th Legislature, amending Art. 4619, Texas Statutes, page 81, Appendix. The fact that in certain circumstances, the wife's rights can be cut off by a sale to an innocent purchaser is of no particular importance. The fact that the doctrine was applied to the wife's interest shows that she was an owner of that interest.

not give away community property with the deliberate intention of defrauding his wife.

Such statement of the limitation is incorrect. The true rule was that the husband, as to that portion of the community committed to his control, had a broad discretion placed in him for reasons of "public policy and social economy,"[1] but he could not overstep the bounds of good faith. The earliest case upon the subject said that "excessive, capricious or fraudulent" donations and sales would be void and that the wife had her remedy.[2] He could not by any means convert community property into his separate property.[3] His acts must have been untainted with fraud. He could not give community property to his paramour.[4] Where the husband neglected or fraudulently refused to sue for damages to the wife's reputation—community property—she was allowed to sue.[5] Her community interest was protected under the statutes which made void any conveyance to defraud creditors "or other persons of or from what they may be lawfully entitled to."[6] When necessary for the protection of property rights, the wife could sue the husband or third parties.[7] Her remedies included the right to require the husband's separate property to account for community funds

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[1] *Taylor vs. Murphy*, 30 Tex. 291.

[2] *Stramler vs. Coe*, 15 Tex. 211.

[3] *Martin vs. Moran*, 32 S. W. 904; *Krenz vs. Strohmeir*, 177 S. W.

[4] *Watson vs. Harris*, 130 S. W. 237; *Coss vs. Coss*, 207 S. W. 127.

[5] *Davis vs. Davis*, 186 S. W. 775.

[6] *Bicocchi vs. Casey Swasey Co.*, 91 Tex. 259. Art. 3996 Texas Statutes, page 80, Appendix.

[7] *Vercelli vs. Provenzano*, 28 S. W. (2nd) 316. See also *Gardenshire vs. Gardenshire*, 172 S. W. 726, *Shaw vs. Shaw*, 111 S. W. 223; *Coss vs. Coss*, 207 S. W. 127; *Dority vs. Dority*, 96 Tex. 215; *Miller vs. Miller*, 285 S. W. 837; *Lamar & Smith vs. Stroud*, 5 S. W. (2nd) 824.

used and, in proper cases, to recover property transferred to third parties, as well as to injunction and receivership.[1] All of this was without the necessity of instituting divorce proceedings or otherwise disrupting the marital relationship.

Such conduct as purchasing endowment insurance with community funds payable to the separate estate of the husband[2] and using community funds to improve the separate estate of the husband gave rise to protective actions by the wife.[3] An attempted gift of community property by the husband to the son of a prior marriage was held ineffective and the son declared a trustee for the benefit of the community.[4] The husband was permitted to expend a small amount of community funds for the purpose of paying premiums upon insurance payable to the child of a prior marriage, but the court indicated that the wife could have recovered her equal share of the premiums so paid.[5] *Coss vs. Coss*, 207 S. W. 127, expressly recognized the right of the wife to sue to protect the community property from fraudulent disposition, even though her residential status was such that she could not bring a suit for a divorce.[6]

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[1] *Vercelli vs. Provenzano*, 28 S. W. (2nd) 316. See also *Gardenshire vs. Gardenshire*, 172 S. W. 726, *Shaw vs. Shaw*, 111 S. W. 223; *Coss vs. Coss*, 207 S. W. 127; *Dority vs. Dority*, 96 Tex. 215; *Miller vs. Miller*, 285 S. W. 837; *Lamar & Smith vs. Stroud*, 5 S. W. (2nd) 824.

[2] *Martin vs. Moran*, 32 S. W. 904.

[3] *Furrh vs. Winston*, 66 Tex. 521, 525; *Rice vs. Rice*, 21 Tex. 58-66; *Maddox vs. Summerlin*, 92 Tex. 483, 487; *Pellum vs. Fleming*, 283 S. W. 531, 534, *writ refused*, 287 S. W. 492. See also *Speer's Law of Marital Rights in Texas*. 3rd Edition, pars. 504, 505, for a treatment of the doctrine of reimbursement.

[4] *Krenz vs. Strohmeir*, 177 S. W. 178.

[5] *Rowlett vs. Mitchell*, 114 S. W. 845.

[6] Fraudulent result, not intent is the test, *Martin vs. McAlister*, 94 Tex. 567. "The statute empowering the husband to manage the wife's separate lands and community assets make the husband essentially a trustee accountable as such to the separate estate of the wife as to the community." *Arnold vs. Leonard*, 114 Tex. 535.

Any restrictions which existed upon the wife's right to submit a controversy with her husband or third parties regarding property rights to a court for determination prior to the institution of a divorce action, should not militate against her actual ownership. They were for her protection and in the interest of family harmony. Rules much more stringent in their application prevent one partner from suing another or a third party with regard to partnership property, except in connection with a suit for dissolution and accounting,[1] yet it never has been suggested that such rule destroys or lessens the actual ownership of either partner in partnership property. A much more basic public policy forbids the litigation of comparatively trivial differences between marital partners by making, when exercised in good faith and free of fraud, the husband's determination as to some property, the wife's as to other, final and conclusive; but, at the same time, leaving all judicial remedies open to prevent substantial wrong.

That the husband's presence as a party in litigation under his control is not because of his exclusive interest or title, but as a representative of the community itself, is further illustrated by the Texas decisions forbidding parties to suits in certain circumstances testifying to transactions with certain decedents. In such cases it has been uniformly held by the Texas courts that the prohibition against so testifying extends to the wife, though she be not a formal party to the suit. This, because of her interest, equal with her husband's, in the subject matter of the litigation, viz., community property. Such

[1] 20 Ruling Case Law, pp. 924-5. Sec. 139, "Partnerships."

extension of the statute to her was limited to community property cases. It did not extend to cases which involved only the husband's separate estate.[1]

It is not true, as asserted by Petitioner, that community property (if, by this, is meant all community property) is made liable for the payment of all debts created by the husband.

Our statutes expressly exempt from the husband's debt-incurring activities the wife's separate earnings, damages for personal injuries to her, and income from her separate property, although all those items of income accrued to the community.[2]

All community property was expressly made subject to the debts of either spouse incurred during marriage, unless specifically exempted.[3] The statutory exemptions were, in part, based upon the wife's limited contractual capacity,[4] without her husband's joinder, and, in part, upon the powers of control of either spouse over particular portions of the community income. The exemption of the revenues from the wife's separate property and of the wife's earnings from liability for the husband's debts[5] and

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[1] Cf. *Simpson vs. Brotherton*, 62 Tex. 170; *Gilder vs. City of Brenham*, 67 Tex. 345.

[2] Art. 4616, Statutes, page 75.

[3] Art. 4620, Texas Statutes, page 76. Appendix.

[4] Art. 4621, Texas Statutes. Limitation on the wife's contractual power are to protect her and her property, not to deprive her of it. *Red River National Bank vs. Ferguson*, 109 Tex. 287.

[5] In re Gutierrez, 33 Fed. (2nd) 987. (Texas) holds that a wife may collect for personal services rendered under contract with the husband in his business from the husband's bankrupt estate.

their subjection to her debts, are plainly not intended as limitations on the husband's contractual powers, as such, nor as an enlargement of her contractual powers, but instead are intended as a recognition of her equal ownership in community property.

Community property likewise is made liable for the payment of any liabilities created by the wife: (a) All prenuptial contract debts[1] (b) all prenuptial and all post nuptial torts,[2] (c) necessaries for herself and children,[3] (d) contractual debts created by her, her husband joining,[2] and (e) her personal earnings and the income of her separate property for all her contract debts and obligations in tort.[4]

In other words, virtually and substantially all her debts are collectible from various items of community income, as his are. Even more can be claimed. There is no debt which the husband can create which is exigible against all items of community income. There are debts which the wife can create which are so exigible.[5]

A particularly interesting case involving a debt created by both husband and wife is *Cullum vs. Lowe,* (9 S. W. (2) 70), in which the wife's half of community property was subjected to the entire debt, although the husband had been discharged therefrom in bankruptcy proceedings.

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[1] *Portis vs. Parker,* 22 Tex. 669; *Taylor vs. Murphy,* 50 Tex. 291; *Lee vs. Henderson,* 75 Tex. 193.

[2] *Patterson and Wallace vs. Frazer,* 93 S. W. 146.

[3] Art. 4621, Tex. Statute. Appendix 76.

[4] Art. 4616, Texas Statutes. Appendix 75.

[5] Necessaries for herself or her children. Arts. 4621, 4623, Statutes. Appendix, pp. 76-77.

No obstacle to the collection of Federal income taxes from any community property or from the wife's separate property existed in 1927 or now exists.[1] The right to enforce the collection of incomes taxes even as against the homestead in Texas has been upheld.[2]

If the taxation of community property and income, therefore, is to be determined by the right to subject it to the payment of the debts and torts of husband and wife, whether they be joint or several obligations, what comfort can Petitioner draw from the foregoing?

It is only partly true that the wife cannot obtain division of community property except in divorce proceedings and then is without assurance that she will receive her one-half of the community property, as asserted by Petitioner.

It is true, the marriage relationship continuing, that the wife cannot compel a partition of community income and community property generally. Neither can the husband. Texas has made no provision for partial disruption of the marital partnership. The same is true as to business partnerships. Yet, it has never been conceived, because a business partner was not privileged to break up the business partnership, while at the same time continuing it,

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[1] Statutes providing that certain property shall not be liable for contractual obligations do not apply to statutory ones. Cf. *Christopher vs. Norvell*, 201 U. S. 216; *Keyser vs. Hitz*, 133 U. S. 138; *Chapman vs. Brown*, 278 S. W. 869; *Chapman vs. Pettus*, 269 S. W. 268; *Austin vs. Crim*, 299 S. W. 322; 6 S. W. (2nd) 348, dealing with the liability of married women as share holders in State and National Banks.

[2] *Staley vs. Hopkins*, 9 Fed. (2nd) 976. See also *U. S. vs. Howell*, 9 Fed. 674; Internal Revenue Cumulative Bulletin, June, 1923, p. 172.

that, therefore, he had no property interest in partnership earnings, partnership income and partnership property.

The marital partnership continuing, there would be no point in a partition of its community assets, for after partition the husband and wife severally would have those statutory powers with reference to the community property which they enjoyed before the division was made, and would, as before, participate in the earnings from the divided property, and the personal earnings of either. *Arnold vs. Leonard,* 114 Tex. 535.

It does not follow, however, that because our laws do not provide for any such an anomalous and fruitless proceeding as a division of the property of the marital partnership, while the marital partnership continues, that the wife is denied legal protection of her equal one-half interest in common property and common income.

In *Dority vs. Dority,* 96 Texas 215, arising before the husband was deprived by the Statute of 1913 of the right to manage the wife's separate property and the revenues therefrom, the Texas Supreme Court decided in a suit, (not for divorce) brought against the husband by his wife, that the management of her property and the control of its earnings should, because of his inefficiency and misconduct, be taken out of his hands and placed in hers, and he restrained from interfering with it, although such earnings from her separate property were then and are now community income.

In another suit[1] (not for divorce) by a wife against her husband, the Court appointed a receiver of separate property of the wife and community property of husband and wife, so that it might be handled fairly for their mutual benefit and enjoined the husband from interferring.

In another case,[2] a wife sued for divorce, and also for the protection of both her separate property and of her interest in the community estate and community income. The prayer for divorce was dismissed for want of jurisdiction, but the property suit proceeded, and therein the trial court granted a temporary injunction, which on appeal was sustained, whereby the husband was restrained "from disposing of the (community) property, from collecting the debts and from paying debts, and also * * * the banks were restrained from paying any money or delivering any property to Francisco Coss, (the husband)."

In another case,[3] it was alleged that the husband had conveyed community property with intent to defraud the wife and the Texas Supreme Court held that the wife was within the protection of the Statute prohibiting fraudulent conveyances and held that the effect of the husband's deed to Mazza was to defraud his wife of her community interest in the property. The Court said that she might have maintained a suit to declare the trust and enforce it, which would have the effect to vest the title in the community.

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[1] *Shaw vs. Shaw*, 111 S. W. 223.

[2] *Coss vs. Coss*, 207 S. W. 127.

[3] *Bicocchi vs. Casey-Swasey Co.*, 91 Texas 259.

It is true that in divorce proceedings, where the situation is such as to warrant unequal division of community property, or even the invasion of the rights of separate property of the spouses, the wife "has no assurance that she will be awarded one-half of the community property," as asserted by the Petitioner, but his statement concerning this matter is misleading unless taken in connection with the qualifying language with which we have preceded the foregoing quotation from his brief.

The Texas Statute on the subject in part reads that the Court pronouncing a decree of divorce shall also decree a division of the estate of the spouses,

"In such a way as the court shall deem just and right, having due regard to the rights of either party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."[1]

The Statute applies equally to husband and wife. Obviously the statute is based upon social foundations. It is not confined to community property, but reaches also with equal effectiveness the separate property of each spouse.[2] It is a substitute for provisions for separate support found in the laws of some States, and for alimony found in the laws of other States, and for equitable provision for the support of children found in some jurisdictions.

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[1] Art. 4638 Texas Statutes. Appendix, page 79.

[2] *Hedke vs. Hedke*, 112 Tex. 404; *Jeter vs. Jeter*, 281 S. W. 598; *Fitts vs. Fitts*, 14 Tex. 443; *Trimble vs. Trimble*, 15 Tex. 19; *Long vs. Long*, 69 S. W. 428; *Helm vs. Helm*, 291 S. W. 648.

The warrant in the Statute just quoted from for a division of the estate of the parties in the divorce proceeding itself is not mandatory, and in the absence of some affirmative provision in the divorce decree unequally dividing community property or appropriating the separate property of one of the spouses to the support of the other or their common children, the property right of each spouse in the common property, remains an equal one-half interest and it may be immediately asserted either by conveyance, by suit for partition, or by any other proceeding open to tenants in common in every jurisdiction.[1] Unless inequality in the division of a common property was affirmatively sought and the proper basis therefor shown in the divorce proceedings, the divorce court had no judicial power to deal in any manner with the common property or to disturb the equal ownership of each spouse therein.

As a further evidence of the wife's independent title to community property, and its income, and the preservation of both, during divorce proceedings, when the common safeguards for her protection, presumed to flow from the husband's affection for her, have terminated, the Texas Statutes affirmatively provide that:

"On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time

[1] *Williamson vs. Gore*, 73 S. W. 563; *Freeman vs. Pierce*, 250 S. W. 778; *Kirkwood vs. Domnau*, 80 Tex. 645.

shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with the fraudulent view of injuring the rights of the wife."[1]

And they give to the wife at any time during the divorce proceedings, the right to exact of her husband "an inventory and an appraisement to be made of both real and personal estate, which are in the possession of the husband,"[2] and the right to obtain "an injunction restraining him from disposing of any part thereof in any manner."[2]

It is not true, as asserted by Petitioner, that a surviving husband's responsibilities as community survivor are greater than the surviving wife's responsibilities in similar circumstances.[2]

As community administrator and community administratrix, respectively, their responsibilities are identical, except that in the case of the subsequent marriage of the wife before her services as community administratrix are fully performed, her powers as such terminate, subject to revesture should she again become widowed while the necessity of further administration exists.[3]

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[1] Arts. 4634, 4635, Texas Statutes. Appendix, page 78.

[2] Title 54, chapter 27, "Administration of Community Property," Arts. 3661 to 3683, Texas Statutes. The analogy between the administration of community property upon the death of one spouse and the winding up of a commercial partnership is very close. *Stone vs. Jackson*, 109 Texas 385; *Leatherwood vs. Arnold*, 66 Tex. 414.

[3] *Summerville vs. King*, 98 Texas 332; as to the husband's failure to qualify as administrator, see *Akin vs. Jefferson*, 65 Tex. 137.

Otherwise, their official duties, their official responsibilities, their official powers are in all respects identical.

Petitioner perhaps has confused the husband's official responsibilities as community administrator, with the general indebtedness responsibility imposed upon him by law when, in the period of the marital relationship, a community indebtedness is created by him. For such debts, since he created the debts, he is individually responsible regardless of the subsequent death of the wife and his subsequent qualification as community administrator. In appropriate circumstances she also can subject herself personally, or be subjected to, responsibility for community debts. When that occurs, even the extra official differences in their responsibilities vanish.

No statutory or judicial compulsion rests upon either husband or wife, respectively, to qualify as community administrator or administratrix. Either, without so qualifying may handle the community estate so far as necessary to pay community debts, and without even such action on the part of either and without the qualification of either as official representative of the estate, an ordinary administrator may be appointed by the Court.[1]

In any liquidation in any character of administration of the community estate after the death of either spouse, all valid community debts created by either spouse may be enforced against the entire community estate or appropriate portions thereof as circum-

[1] *Stone vs. Jackson*, 109 Tex. 385; *Leatherwood vs. Arnold*, 66 Tex. 414.

stances warrant.[1] With or without administration, (subject to the sole qualification above stated, that the remarriage of the wife after qualifying as community administratrix interrupts her official powers) their several estates and powers with reference to the community property are identical. Each in his or her lifetime may devise his or her one-half of the community property.[2] The share of each at death is identical.[3] The nature of the title and estate which each has at the death of the other in the common property is identical.[4] Nowhere in our Statutes or decisions can be found any foundation upon which to base a contention that the wife's interest, or the interest of her heirs, differs in any respect from the husband's or his heirs.

It is not true, as asserted by Petitioner that the husband's powers over community property and income under Texas laws are substantially as under California laws.

As Petitioner has presented this challenge as to the substantial identity of the laws of Texas and California in the matter in controversy in connection with his citation of the decision of this Court in *United States vs. Robbins*, 269 U. S. 315, it is fair for us to presume that the laws of California as they

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[1] Art. 3661, Texas Statutes.

[2] Arts. 8281-8282, Texas Statutes. Appendix, pp. 79-80. *Parker vs. Parker*, 10 Tex. 83; *Brown vs. Pridgen*, 56 Tex. 124; *Moss vs. Helsley*, 60 Texas 426; *Rogers vs. Trevathan*, 67 Tex. 406.

[3] Arts. 2578-2579, Texas Statutes. Appendix, page 79. *McCowan vs. Owens*, 40 S. W. 336; *Clemons vs. Clemons*, 45 S. W. 199; *Edwards vs. White*, 120 S. W. 914, 916.

[4] *McCowan vs. Owens*, 40 S. W. 336.

existed when the controversy in the Robbins case arose are the laws referred to.

In his brief in the Robbins case Mr. Mitchell,[1] then Solicitor General, furnished the Court a summary of the California laws pertinent to the controversy in the Robbins case as he viewed it.

A comparison of the California laws, as there summarized, and the Texas laws, as developed in the briefs filed in this suit, discloses material differences in the two legal systems at nearly every point:

1. In Texas, the husband had not complete and absolute dominion, possession and control of the community property. Over some of it he had no dominion, control, possession, or power of disposition, and over none of it was his agency complete and absolute.

2. In Texas, portions only of the community property were subject to debts contracted by the husband. Equivalent portions were subject in like circumstances to debts contracted by the wife.

3. In Texas, the husband had no right to expend community property and income as he pleased, wastefully and for his own pleasures, regardless of his wife's rights.

4. In Texas, the restrictions on the alleged absolute ownership of community property and income by the husband are and were: Her absolute ownership of one-half thereof, coupled with the right to enjoy it

[1] See pages 4-6; Brief of the Govt. in *U. S. vs. Robbins*, 269 U. S. 315, in this Court.

while living, the right to have it on divorce, the right to devise it at will, the right to have it descend to her heirs, the right to protect it against fraudulent impairment or waste, the right to contract with reference to parts of it, the right to manage and dispose of parts of it, the right to have it exempt from his debts, the right to have it applied to her debts, the right to resort to it for her pre-marriage obligations and for her post-marriage contract obligations which the husband joined with her in making, the right to have her torts discharged from it, and many other rights discussed in detail throughout this brief.

5. In Texas, the obligation of the husband to provide for the wife's support was a personal one, but greater and different assurance for her support grew out of her right to manage and control her personal earnings, the earnings from her separate property, and by injunction or receivership to prevent gross misconduct of the husband in handling community funds. Her right to charge the entire community estate and income for necessaries was not limited to necessaries in an absolute sense, but to such support, to be determined by her in the first instance, as her social position and the common estate reasonably justified.[1]

6. In Texas, the wife in ordinary circumstances could maintain actions respecting the community income, of which she was given management and control, and in extraordinary circumstances she dis-

[1] "She herself will be the judge of what are such necessaries, subject to the condition that it must appear to the satisfaction of the Court and jury that they were reasonable and proper." Speer's Law of Marital Rights in Texas' 3rd Edition, paragraphs 176, 177.

placed the husband as the general community agent and could conduct litigation. In all cases she could be an active party to litigation and be charged with its consequences unless her coverture and her immunity from participation in the suit were insisted upon.

7. In Texas, dissolution of the community by the wife's death neither created nor terminated her ownership of an equal half interest in the common property. Prior either to her death or the husband's death her interest was not inchoate. It was vested, present, certain, fixed and definite. Ownership was in her and her husband, and not in the husband alone. She left an estate in the community property which was subject to administration. It was liable for her debts, and for expenses of administration. If the husband took it all he must take it by succession from her or by virtue of affirmative testamentary gift of it to him.

8. In Texas, whether or not the wife survived her husband she always had her one-half interest in the community property. If she survived him she succeeded to his half of the community property only after he had devised it to her or she took it as his heir at law under the Statutes of descent and distribution. She had her own half as owner.[1] She could take his half as heir. Her half at his death was never subject to State inheritance tax nor the Federal estate tax.[2] His half only was subject to such taxes and it was so subject whether she took it or it passed to other devisees or heirs.[2] At her death her

[1] *McCowan vs. Owens*, 40 S. W. 386.

[2] *Jones vs. State*, 5 S. W. (2nd) 973, Treasury Divisions 2450, 3138, Art. 7117, Texas Statutes. Appendix, p. 80.

one-half, as well as her separate estate, on passing to her devisees or heirs was subject both to the State inheritance tax and the Federal estate tax.[1] Such consequences did not proceed from special statutory arrangements, distinct from ownership, but were based upon her ownership of her interest in the community property and its passage to her devisees and heirs.[1]

9. In Texas there was no statutory restriction on gifts by the husband. Such restrictions here were based on general equitable principles which forbade his giving away property in which she was a substantial owner. Her title did not rest upon nor grow out of such equitable restraints, but was statutory and preceded the gift.

10. In Texas, on dissolution of marriage by divorce, the common property, being owned equally before divorce, remained equally the property of the separated spouses, unless, because of compelling social obligations of the spouses, the court, in the very decree itself for good cause, upon petition of either spouse made unequal distribution of it. Such power of the court did not flow from the nature of the title of the spouses to community property only, but extended in like manner to property separately owned by each.[2] We know of no case in the Texas Courts (and Federal Courts would not have jurisdiction of

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[1] The children of a prior marriage share equally with the children of the immediate marriage, and, when husband or wife dies intestate, with no children of the immediate marriage, take all of the deceased's share. *Clemons vs. Clemons*, 45 S. W. 199.

[2] There is no distinction in this respect between separate and community property. *Hughes vs. Hughes*, 259 S. W. 180.

divorce proceedings) where the wife's half interest in community property or her separate property was awarded to the husband or their children on account of her misconduct. In one case, where the wife's separate estate had been acquired by gift from her husband and at the time of the divorce he was penniless and infirm, a charge upon such separate property of the wife was made by the court to aid in the husband's support.

11. In Texas, the community property was liable for the debts of the wife contracted after marriage, except those expressly excepted, as elsewhere in this brief pointed out, and certain items of community property were liable even for those debts. The entire community property was liable for her debts contracted dum sola.[1]

12. In Texas, the entire community property and the wife's separate property was exigible for her income tax obligations to the United States and no obstacle existed which would prevent the Government from asserting its claim for income taxes against her in the same manner as its claim for income taxes against the husband. The United States could lawfully reach the wife's share of community property and community income and her separate property, because it was hers and no State barrier could effectively stop the Government's process.[2]

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[1] *Austin vs. Crim*, 6 S. W. (2nd) 348.

[2] A state could not restrict the Federal power to "levy and collect taxes." Revised Statutes, 3187 (Sec. 1016, Revenue Act of 1926) and 3186, providing for the seizure and sale of property and exempting only certain property apply—exclude state exemptions and apply to "all property and rights to property." The system has been successfully administered for ten years.

In the opinion of the Attorney General, Feb. 29, 1921,[1] denying to spouses in California the right to file divided returns of community income, (while recognizing the right of spouses in Texas so to do,) he contrasted the California and Texas situations saying:

> "As appears from my opinion of September 10, 1920, in Texas the control of community property is divided between the husband and wife. In that State on the death of either spouse without issue, the survivor takes the whole, and where there is issue takes one-half, the other half going to said issue or their descendants. Under the State inheritance law the wife pays no tax on her one-half of the community property."

This Court, in its decision in *U. S. vs. Robbins,* 269 U. S. 315, dealt solely with the California system, but obviously had in mind that in other jurisdictions quite different conclusions must be reached than were expressed in its opinion in that case. As Respondent views it, Petitioner gets no substantial support from the opinion in the Robbins case.

The controversy which culminated in the Robbins decision arose in 1918 upon the Revenue Act in force in that year. The opinion referred to *Warburton vs. White,* 176 U. S. 484 (a Washington case), *Arnett vs. Reade,* 220 U. S. 311 (a New Mexico case), and the rulings and regulations of the Treasury Department, and declared that the adoption of different rules in such other states by the Treasury Department was based upon the notion that in California the wife's interest was a mere expectancy, while deemed vested

[1] 32 Ops. Att. Gen., 435; 4 C. B. 238.

and substantial in the other jurisdictions. Neither the decisions nor the rulings or regulations of the Treasury Department, as applicable to other jurisdictions, were criticized; and primarily, the Robbins decision was based upon the concept that the California decisions, for more than sixty years, had settled the rule there to be that the wife's alleged interest in community property was a chimera; and that this Court properly should follow the settled California law, denying her any real interest in the so-called community.

The closing paragraph of the opinion in the Robbins case neither actually nor hypothetically abandoned the views expressed by the Court in the prior paragraphs of that opinion, but asserted that even if the wife "had an interest in the community income that Congress could tax," the interest was so unreal and insubstantial that Congress could tax it to the husband, as being the actual owner of it. The bulk of the paragraph was devoted to discussion of the premise that the wife's interest, if any, in community income in California, was so shadowy, so ghostlike, that Congress obviously did not intend in passing Revenue Acts to tax such income to her, but did intend to tax it to the husband, its actual and substantial owner.[1] It seems beyond argument that the opinion in the Robbins case was fitted peculiarly to the California system as then existing and was

[1] The contrary intention as to Texas is conclusively shown by the Legislative and Executive history discussed here in pages 53 to 57. In his motion to advance in the Robbins Case, the Solicitor General said: "It has been the established rule of the Treasury Department" in respect to community property in the State of Texas that the income from such property was taxable "one-half to the husband, one-half to the wife, since September 18, 1920."

not intended to control cases coming up under community systems in which the wife actually, substantially and vitally owned one-half of community property and community income. Nothing either in the brief of the Solicitor General in the Robbins case or in the opinion of this Court in that case or the necessities of the case itself, required the conclusion that this Court there attempted to lay down a general rule applying to all community property states.

The very criteria grouped in the last paragraph of the Robbins opinion as significant are absent here. As already pointed out, it was not true in Texas in 1927, and is not true now, that the husband alone had and has the disposition of community property and income, that he could and can spend it as he chooses or waste it in debauchery, the wife being without redress. It was and is not true in Texas, then or now, that the husband was the more obvious target for the tax shaft nor that the fund taxed (community income), while liable to be taken for his debts, was not liable to be taken for the wife's. It was and is not true, then or now, that the remedy for her failure to pay her income taxes might be hard to find. Whether income taxes be assessed against the wife alone or against the husband alone or against both, they were paid from the same source, community funds. Each spouse's share was diminished equally thereby.

The effect of the plan urged here by the Government would be to place a tax burden upon the husband on account of an income he does not own, but

it also would have the effect of increasing the tax burden of both husband and wife because of the progressive rates imposed under Section 211 and the surtax provisions of the Act.

Other positions adopted by the Court in the Robbins opinion vital to the decision of that case are not paralleled here. It was not true here that the wife owned no legal or substantial interest in community income. The contrary was true. It was not true here that the Supreme Court of Texas had settled the law to be that the wife had a mere expectancy. Our Supreme Court had settled the law exactly to the contrary. It was not true here that Arnett vs. Reade would not be followed. It is expressly followed. It was not true here that the commonly prevailing understanding was contrary to our contentions in this case nor that the commentators upon Texas law so stated, the Treasury Department so ruled and our courts so declared. The truth was exactly to the contrary. It was not true that the Texas laws placed the burden of income tax liability upon the husband alone. The contrary was true.

In other words, here we had a situation in which husband and wife were equal co-owners of community property, each having ownership as formally and substantially vested as ownership can be vested under our laws. Each, in like manner, owned the community income.

The wife's immunity from the income taxes under the California system and the immunity of her own

property from such taxes was grounded by this Court in its opinion in the Robbins case upon the fundamental concept that, under the California laws, she had no community income and therefore could not be taxed for it.[1]

Where, however, the wife's ownership of community income is established and vested and where, in like manner, her ownership of community property is established and vested (both of which conditions are true in Texas), all imaginable difficulties in the way of imposing the tax upon her and collecting it from her or her property are eliminated by the Federal Statutes, which provide as effective machinery for collecting the tax from her as from her husband.[2]

In *Corliss vs. Bowers*, 281 U. S. 376, there was involved no question, pertinent here, of construction of the Revenue Act, but solely the constitutionality of its language expressly imposing the tax sought there to be avoided. This Court held simply that the constitutional attack must be overruled. The decision, however, is helpful to Respondent in this case rather than to Petitioner, for there, although the income was actually being received by a trustee and had actually been paid to the beneficiary of the trust, the legal right which the creator of the trust had reserved to stop its payment to the beneficiary was held to be

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[1] In the Government's brief in the Robbins case, it was said: "The United States could not lawfully compel the wife to pay an income tax on any share of the community income, because it is not hers, but is the income and property of her husband." Brief page 6. And, on page 55, "Its (a tax on the wife) validity would have to be denied on the ground that the wife has no real interest in the income, and she cannot be rendered personally liable for the income tax on her husband's income."

[2] See foot-note, page 44 hereof.

such an interest in him as to make him the proper target of the tax. It is significant, moreover, that an express taxing provision was required to accomplish the result in that case and that until its adoption the taxing rule had been to the contrary.

Neither the Robbins decision nor the Corliss decision justifies the view that possession or control of income are the determinative basis of the incidence of the tax, nor has this Court or any other court ever held that the language of Section 223 of the Revenue Act giving to husbands and wives, at their option, the right either to file separate or aggregated returns, was impotent and must be disregarded.

After all, the foundation of the clause of the Revenue Act which was involved in the Corliss case and the foundation of the decision in that case was that, when the income there involved was actually received, the creator of the trust had not completed his gift of it to the beneficiary nor had she acquired title to it.[1] The time element was there determinative. It was his income, when received by the trustee, by virtue of the reservation.

The same considerations, when applied to community income, are controlling here. At the moment community income is received, either by husband or wife, it belongs equally to both, although one or the other, after its receipt, may violate his or her martial duty to the other respecting it and make unwarranted expenditures or unwarrantably waste it. If, at the moment of the receipt of community income,

[1] Cf. *Saltonstall vs. Saltonstall*, 276 U. S. 260.

and while it still exists in the hand of its recipient, suit for divorce were brought, the interest of each spouse in the income contemporaneously received would be admitted. If a division were immediately made each would be declared to be the owner of one-half of it. The same would be true upon division made at any time thereafter.

This Court, in the case of *Buchser vs. Buchser,* 231 U. S. 157, has emphasized the point that the time factor is of prime importance.

Tyler vs. U. S., 281 U. S. 497, stated afresh the need of our keeping in mind at all times that husband and wife are separate individuals and that, even in such closely integrated property relationships as existed in tenancies by entireties under the laws of Pennsylvania and Maryland, the rights of each spouse are substantial and the death of either may create a taxable succession. Therein Mr. Justice Sutherland characterized the fiction of the common law of identity of husband and wife as an "amiable fiction," and stated that such a fiction, when a taxing act is applied to it, "seems quite unsubstantial." However, in that very case, this Court, in dealing with the highly technical and unreal conceptions of tenancies by entirties declared that the decisions of the local courts of Maryland and Pennsylvania "established a state rule of property by which this Court, of course, is bound."

Petitioner complains in this case that the titles of respondent and his wife respectively rest upon "adjectives." Without adjectives we cannot imagine

how gradations in meanings of substantives can be conveyed by human speech.

Petitioner asserts that "enjoyment" of community income is a taxing criterion, but does not attempt to define enjoyment. Respondent is at a loss as to what is meant by the term. It could hardly be said that a wife who owns community income and has the management and control of substantial parts of it, who is supported by means of it, who finds that its slow increase through savings and investment is providing for her old age, who at all times has the right to legal action to prevent its unwarranted dissipation, and who may devolve it upon her devisees or heirs at law, may not be taxed for it because she does not "enjoy" it.

It is neither necessary nor proper to seek any new test of to whom income is taxable. The statute has settled the question. "Of every individual" means "owned by every individual." Every conception of income and taxation is founded upon ownership,[1] and most attempts to disregard this fundamental conception have been declared beyond the legislative power.[2] "With respect to taxation, usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons on the property which they own, not on the property which others own."[3] The wife in Texas both owns and enjoys an equal share of community property and income.

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[1] Cf. *Hylton vs. U. S.*, 3 Dall 171; *Pollock vs. Farmers Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Eisner vs. Macomber*, 252 U. S. 189.

[2] Cf. *Knowlton vs. Moore*, 178 U. S. 41; *Lewellyn vs. Frick*, 268 U. S. 238; *Nichols vs. Coolidge*, 274 U. S. 531.

[3] *Home Savings Bank vs. Des Moines*, 205 U. S. 503.

Fourth Contention.

The settled departmental and Congressional construction of the identical language of the successive Revenue Acts which preceded the 1926 Act was that husbands could not be required to return nor to pay taxes upon the wife's half of community income, and such construction became a part of the Act.

The Petitioner in his brief refers to the departmental and Congressional history of the tax laws as they relate to community income as if they were of passing or historical interest only.[1] We submit that, standing alone, this history is conclusive of the question here presented. This phase of the case is common to all of the community property income tax cases now before the Court,[2] and because of this and its importance will be covered more fully in the joint brief to be filed in behalf of all of the tax payers. We will only summarize the principal facts.

The Treasury Department had given no official recognition to community property systems until 1920. In that year the Bureau of Internal Revenue in an office decision gave partial recognition to the system and authorized divided returns of husband and wife in Texas.[3] This decision was obviously incomplete and the whole question insofar as it related to the State of Texas was referred to the Attorney General. That official ruled that, because of the equal ownership of husband and wife in community income in Texas, they were authorized and

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[1] Petitioner's Brief p. 10.

[2] Nos. 15, 84, 86, 106, Oct. Term, 1930.

[3] O. D. 429, 2 C. B., 198.

required to file separate returns and report in equal shares such income.[1] The opinion was complete. It went fully into the attributes attaching to the wife's interest and was based not only upon the express recognition of ownership by the Texas Courts in the wife, but upon the attributes and powers which she had over it.

His opinion was immediately published by the Treasury Department as the decision of that Department[2] and put into effect, not only as to the 1918 Act to which it directly related, but as to all prior Acts in situations not closed by the statute of limitations.

Shortly thereafter the Attorney General was asked to rule as to the situation in other community property States, and in 1921[3] ruled that in six states the same rule announced for Texas should be applied, but that in California, the wife did not have the same rights as in the seven other community property states.

From then until now[4] (subject only to these test cases) the Treasury Department has accepted divided returns in the seven community property States referred to and has administered the law on that basis. The Department of Justice has never receded from the position announced in the opinions

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[1] 32 Ops. Atty. Gen. 229.—Sept. 18, 1920.

[2] T. D. 3071, 3 C. B. 221.

[3] 32 Ops. Atty. Gen. 435, Feb. 26, 1921.

[4] A ruling giving recognition to the principle was made Aug. 25, 1930. General Counsel's Memorandum 8909, Int. Rev. Bulletin Vol. XI, No. 34, Page 14.

mentioned. They were, however, withdrawn in 1927 to make way for these test cases.[1]

Such in brief is the departmental history of the question.

In Congress, when the 1921 Act was under consideration, the Treasury Department urged upon Congress the "inequality", so-called, brought about by the opinions of the Department of Justice. In that Act, as it passed the House, there appeared a section, expressly relating to community property, requiring the spouse who had the control of community income to report it in a single return.[2] This change was defeated in the Senate probably as the result of a showing made that the rule was not unequal or unfair, and the 1921 law was passed with language identical, as far as pertinent hereto, with the language contained in the 1918 Act which the Attorney General had construed and which the Treasury Department had adopted as above shown.

Again in 1924 the Treasury Department recommended to Congress the adoption of the same provision which had been defeated in 1921. The new matter was contained in the original draft of the Bill, in the House but was defeated before the Bill left the House. Again Congress passed the Revenue Act with language identical with that used in the 1918 law.[3]

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[1] 35 Ops. Atty. Gen. 265, July 16, 1927.

[2] Report of Committee on Finance, page 14.

[3] For debates and actions both in 1921 and 1924. See Vol. 61, Cong. Rec. No. 140 for Oct. 27, 1921, page 6872, *et seq.* Same vol., No. 146 for Nov. 3, 1921, page 7229. Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pages 194, 348, 375, 478, 482.

No attempt was made to vary such standard provisions when the 1926 law was passed, nor to incorporate in the law anything which would require a different treatment of community income from that which had been used for the previous six years.

Such in brief is its Legislative history.

Certainly Congress, when it passed the Revenue Act of 1921 and refused to include the clause taxing community income to one spouse, knew that by using the language of the 1918 Act, it was continuing the practice begun in 1920. Congress thus knowingly and purposely said that the wife's half of community income in Texas was a part of her net income and the husband's share a part of his, and that each should make separate returns. By its conduct in 1924. Congress reiterated and again announced that it adhered to and readopted this construction. The use of identical language in the 1926 Act, coupled with uniform departmental construction and application, shows beyond all questions that Congress intended for the same language to mean the same thing. For the third consecutive time it expressly approved and adopted the views of the Attorney General as to the meaning of the acts. This construction became as much a part of the law as if set forth at length in it.

The authorities to this effect are so numerous, have been announced by this Court so many times at every term, that only a few will be cited and none discussed.[1] In not a one of them can be found stronger

1 *U. S. vs. Minnesota*, 270 U. S. 181; *Heald vs. District of Columbia*, 254 U. S. 20; *National Lead Co. vs. U. S.* 252 U. S. 140; *U. S. vs. Hermanos Co.*, 209 U. S. 339; *Copper Queen Consolidated Mining Co. vs. Arizona Board of Equalization*, 206 U. S. 474; *U. S. vs. Falk*, 204 U. S. 143; *N. Y. etc. Ry. Co. vs. I. C. C.*, 200 U. S. 361; *U. S. vs. Johnston*, 124 U. S. 236.

and more convincing evidence of Congressional intention and approval of departmental construction. Even if another construction strongly appealed to the Court, it could not be adopted without overriding the expressed will and intention of Congress.

It will be presumed that Congress in passing successive Revenue Acts, since the adoption of the Sixteenth Amendment to the Constitution, had in mind the varying property systems in effect in the several States and intended that community incomes should be taxed to their actual owners as well as that incomes of other types in other States should be taxed to their actual owners.

It has been sometimes loosely said that Congress and the Courts should view *strictly* community incomes in community property States because: (a) Such systems are excresences and abnormal; (b) perhaps are distorted and misused in order to obtain for husbands and wives in those States tax advantages over husbands and wives in common law States; and (c) the existence of such incomes was advertently overlooked by Congress in enacting tax laws.

Such critical suppositions have no statistical or other support. It cannot fairly be said that they are excresences and abnormal. Viewing the geographical range of the United States there is less reason for regarding the community system as excresences or abnormalities than there would be for so regarding common law systems or other systems in effect in other States. Geographically, the community system, in one form or another, exists throughout nearly one-

third of the territory of the forty-eight States of the Union. The States in which it is in effect are Louisiana, Texas, New Mexico, Arizona, California, Nevada, Idaho and Washington. The territory according to unofficial estimates contains nearly twenty-five million people and approximately one-fifth of the wealth of the Nation. It has been a component part of our national territory for more than eighty years, viz.: Louisiana since 1803, Washington and Idaho since 1843, Texas since 1845, California, Nevada, New Mexico and Arizona since 1848.

Historically, community property systems have been familiar social and legislative conceptions since the early centuries, during which the civil law was taking shape throughout the Roman world, and for nearly two thousand years they have been rooted in the governmental systems of most of the important nations of the world.

In contrast, the common law system is much younger, much less extended geographically and ethnologically, being virtually confined to some parts of the English speaking world, and itself has been so modified by Statutes in each separate State of our Nation as to be only approximately recognizable as a common law system.

Petitioner's position, stated in his brief, that in States having the common law, statute-modified, system as in Minnesota and in other states having the community system, Congress, in passing the Revenue Acts, intended to force the taxation of family incomes of all married persons into uniformity (Brief,

p. 7), if applied would produce interesting difficulties. The result in Minnesota would be that, although in Minnesota income from the wife's separate property is hers, the profits from her contracts and business activities are hers, compensation for her services is hers, damages for injuries to her person, reputation or property are hers, yet, because she was married, her income could not be returned by nor taxed to her, but must be added to her husband's income and be returned by and taxed to him along with his own.

If, in Minnesota, the husband is not taxed as the head of the "social and economic unit" against which the income tax is aimed, (as asserted by Petitioner) for his net income plus the income of his wife, but in Texas such aggregated incomes derived from similar sources are taxed to him alone, where is the desired uniformity visualized by Petitioner?

It cannot fairly be said that community property systems are distorted and misused in order to give husbands and wives in those States tax advantages over husbands and wives in common law States. On the contrary, *Section 223 of the Revenue Act obviously was a Congressional declaration that the Revenue Act should be applied to the varying systems of the various States and in itself was a recognition of the almost infinite variety of conditions to which the law must be applied.*

Congress never intended that State systems must be adjusted to fit the Revenue Act, but consistently has acted on the theory that the Revenue Acts must be fitted to the systems in vogue in the several States.

Moreover, it is by no means certain that the community system gives any tax advantages to tax payers in these States. In the forty states of the Union not having the community system, their own systems have been so changed by Statutes, have become modernized, individualistic systems, have adapted to their social needs such civil law and common law conceptions as joint estates, tenancies by entireties, equitable trusts, marriage agreements and settlements, gifts inter vivos, wage agreements, and the like, as automatically to create separations of incomes between husbands and wives. Collectively, they may be of more significance and influence in a particular State in dividing the gross gains of husbands and wives between them, and to make the principle of divided returns of more effective application in them, than the simpler and more uniform community systems existing in the community property states. At all events, there is as much reason for the Courts to say that the property arrangements in the forty states which have not the community system are aimed at tax evasion as to say that the simpler, more uniform, Statute regulated, two thousand years old community systems were designed for tax evasions.

It cannot fairly be said that Congress, in passing the Revenue Acts which it has passed since the adoption of the Sixteenth Amendment, was unaware of or ignored or dealt inadvertently with the community property systems in effect in such an enormous area of our territory and among such a large portion of our people. It is not imaginable even.

The eight States in question had sixteen Senators participating in the framing of those laws. Approxi-

mately one-eighth of the membership of the House were members from those States. Community incomes had been the theme of appropriate departmental rulings and regulations under the Revenue Acts for many years before the 1926 Act was passed and were the topic of several hearings before Congressional committees and the object of several Amendments proposed to Revenue Acts on several occasions. In all these circumstances the intention of Congress is not a speculative inquiry. Its intention was and is plain that, in community property States, the wife having a vested interest in community income should report it and that the husband was not obligated to report it or to be taxed for it.

Fifth Contention.

It being settled law in 1927, binding upon this Court, that Respondent owned a part only of the aggregate community income received by him and his wife in that year, the taxation of Respondent upon his part thereof plus that of his wife, as contended for by Petitioner, would violate the Federal Constitution.

The constitutional provisions which would be infringed, if Petitioner's contentions be allowed, are the third clause of Section 2, the fourth clause of Section 9 of Art. I, Section 8 of Art. I, and the Fifth Amendment to the Constitution. In that connection, it is denied that the positions of Petitioner are warranted under the Sixteenth Amendment to the Constitution.[1]

In determining how the Revenue Act under consideration must be construed, there must always be

[1] *Brushaber vs. U. P. E. R. Co.*, 240 U. S. 1, 24.

borne in mind the constitutional limitations under which Congress acted in passing it. Congress cannot make an item "income" merely by calling it "income"[1] and, since there can be no conception of taxable income except as related to a person, natural or artificial, Congress, in providing for its conception, must relate it to some person, natural or artificial. Congress must not bring its taxing enactments into conflict with the Fifth Amendment by taxing arbitrarily or capriciously, nor lay either a direct or an indirect tax without regard to constitutional limitations.

In this case a part of the income in question was derived from real estate and invested personal property. This property and its income belonged in equal portions to Respondent and his wife. Income from such property was an inseparable part and incident of the property itself. *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601. Half of the property being the husband's and half of it being the wife's, the income belonged to each in like fractions. The husband's half of the community property had as its incident his half of community income. The wife's share of both property and income was similar.

Any construction of the Revenue Act which would bring the Act itself into conflict with constitutional limitations should, if possible, avoided.[2] It is

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[1] *Eisner vs. Macomber*, 252 U. S. 189; *Taft vs. Bowers*, 278 U. S. 420.

[2] There is no more compelling rule of statutory construction. *Lewellyn vs. Frick*, 268 U. S. 238; *U. S. vs. Delaware & Hudson Co.*, 213 U. S. 366, 408; *U. S. vs. Jin Fuey Moy*, 241 U. S. 394, 401; *Harriman vs. I. C. C.*, 211 U. S. 407.

our view, in the light of this principle, that Petitioner's position to the effect that Respondent in this case should be taxed, not only for his own income from common property, but, also, should be taxed for his wife's income from common property, would violate constitutional limitations and, therefore, the Revenue Act should not be construed as so requiring, unless such ruling is inescapably necessary.

The wife's half of community income from property being an inseparable incident of the property, any tax upon her half of the income or her half of the property would be a direct tax, but such gains would not be "income" of the husband and therefore would not be exempted from apportionment by the Sixteenth Amendment. If the Revenue Act be so construed it would violate the third clause of Section 2 and the fourth clause of Section 9 of Art. I of the Constitution.[1]

If it should be decided that the nature or incidence of the tax under the circumstances was such as to cause it to be deemed an indirect tax, it would infringe the eighth Section of Art. I of the Constitution. Husbands in the community property states, because of their agency relationship to community property and community income, and because of their marital connections with the wife owning the income would be taxed, while in other states husbands situated substantially similarly would not be so taxed.

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[1] *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Brushaber vs. U. P. R. R. Co.*, 240 U. S. 1, *Eisner vs. Macomber*, 252 U. S. 189.

If it be held that Respondent could be taxed not only upon his own income, but that the income of his wife could be added to his and the aggregate taxed as one income, with the result, not only that Respondent would be taxed upon an income not his, but his income, as well as his wife's income, would be brought under higher brackets, the tax would violate the Fifth Amendment as being so arbitrary and capricious as to amount to a taking of property without due process.[1]

These constitutional objections are more fully developed in the joint brief which counsel are filing in all of the test cases. The presence of these constitutional questions, the seriousness of which were admitted in the Government's brief in the Robbins case, affords an ample reason for not adopting the construction of the Revenue Act which is urged upon this Court by Petitioner.

IV.

CONCLUSION.

For the reasons urged, we respectfully submit that the judgment of the trial court awarding to Respondent recovery of the taxes illegally exacted of him and the judgment of the Circuit Court of Appeals affirming the judgment of the trial court ought both

[1] *Nichols vs. Coolidge*, 274 U. S. 531; *Untermeyer vs. Anderson*, 276 U. S. 440; *Blodgett vs. Holden*, 275 U. S. 142; *Knowlton vs. Moore*, 178 U. S. 41, 77.

to be affirmed, and Respondent, accordingly, respectfully so prays.

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APPENDIX.

Pertinent Portions of the Revenue Act of 1926.

Section 2(a). "When used in this Act—(1) the term 'person' means an individual, a trust or estate, a partnership or a corporation * * * (9) the term 'taxpayer' means any person subject to a tax imposed by this Act."

PART II. INDIVIDUALS.

Normal Tax.

Section 210(a). "In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of five per centum. * * *"

Surtax.

Section 211(a). "In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *"

Credits Allowed Individuals.

Section 216. "For the purpose of the normal tax only there shall be allowed the following credits: * * * (c) * * * or in case of the head of a family or a married person living with husband or wife, a personal exemption of $3,500. A husband and wife living together shall receive but one personal exemption. The

amount of such personal exemption shall be $3,500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them."

Partnerships.

Section 218(a). "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, * * *"

Individual Returns.

Section 223(a). "The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title * * * (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband and wife; * * * (b) if a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over (1) Each shall make such a return, or (2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

Texas Constitutional Provisions Relating to Husbands and Wives.

Constitution of Texas (adopted 1876), Art. XVI, Sec. 15:

> "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall be passed provided for the registration of the wife's separate property."

(The Constitution of Texas may be found printed in the Official Code of 1925 or in Vernon's Annotated Revised Civil Statutes of Texas, Revision of 1925.)

History of Texas Statutes Regarding the Property Rights of Married Women.

A brief history of Texas statutes regarding the property rights of married women is here inserted as a preface to the reproduction of the statutes themselves.

From the Act of March 13, 1848, until 1913, the statutory law of Texas provided:

(a) That all property, both real and personal, of the husband owned or claimed by him before marriage and that afterward acquired by gift, devise, or descent, as well as the increase of all lands thus acquired, should be the separate property of the husband.

(b) The wife's acquisitions from the same sources were likewise classified as her separate property.

(c) As to the wife's separate property it was provided that "during the marriage the husband shall have the sole management of all such property."

(d) All other property acquired by either during marriage was classified as common property "and during the coverture may be disposed of by the husband only."

(e) All property found in the possession of either at the dissolution of the marriage was regarded as community property until satisfactorily proven otherwise;

(f) The wife was given authority to contract debts for necessaries furnished her and her children and for expenses incurred for the benefit of her separate property, and she was given a remedy should the husband fail to support her from the proceeds of her lands, or fail to educate her children, as her fortune might justify.

(g) The community property was made liable for all their debts contracted during marriage except in such cases as were specially excepted.

The first important change in this system was made by the 33rd Legislature (Acts of 1913, Chap. 32, p. 61). By this act the following changes were made:

(a) The separate property of the husband was exempted from liability for debts contracted by the wife, either before or after marriage, except for necessaries furnished her and her children after her marriage.

(b) Express provision was made for the husband having sole control of his separate property:

(c) The wife was granted "sole management, control and disposition of her separate property" except that the joinder of her husband was required for the conveyance of her separate real estate and the transfer of stocks and the bonds belonging to her, with the proviso, in the case of his refusal to join, for a court order authorizing her to execute such instruments alone.

(d) The wife's separate property, interest on bonds and notes belonging to her, dividends on stocks owned by her and her personal earnings were exempted from the payment of debts contracted by the husband.

(e) The provision authorizing the husband to dispose of community property during coverture was amended to provide that the wife's personal earnings, rents on her real estate, interest on bonds and notes, and dividends on bonds and stock should be under her control, management and disposition alone.

(f) It was further provided that funds on deposit in a banking institution should be presumed the separate property of the party in whose name they stood.

(g) The husband's separate property and all com-

munity property except the wife's personal earnings and income, rents and revenues from her separate property were exempted from the payment of debts contracted for by the wife, except for necessaries furnished her and her children.

The second section of this Act provided "the fact that the present law denies to married women the right to manage their separate property and to make contracts is unjust to a large number of citizens in this state; creates an emergency, and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and it is hereby suspended."

By the Act of April 4, 1917, the Legislative attempted to make the following changes:

(a) The rents and revenue from the husband's separate property were classified as his separate property.

(b) The rents and revenues from the wife's separate property were classified as her separate property.

(c) The following provision was added: "The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessaries furnished her and her children, unless the husband joins in the execution of the contract. Provided that her rights with reference to the community property, on permanent abandonment by her husband, shall not be affected by the preceding sentence."

By the Act of March 15, 1915, Chapter 54; the Legislature attempted to make compensation for personal injuries sustained by the wife, her separate property except to the extent that the husband had

expended money for hospital and medical expenses, etc.

The 38th Legislature (Acts of 1923, page 338, Ch. 159) authorized a complete revision and digest of the general laws of Texas both civil and criminal. The work of the Commission appointed to carry out this revision and digest of civil laws was presented to the 39th Legislature under the title "A Bill to be entitled an Act to adopt and establish the revised civil statutes of the State of Texas." This Bill was enacted into law by the 39th Legislature on March 13, 1925; the Bill was approved by the Governor on April 21st, 1925, and took effect September 1, 1925. It is this revision which is quoted in this appendix, and which is sometimes referred to as the Code.

The case of *Arnold vs. Leonard*, 114 Texas, 535, 273 S. W. 799, which held that the attempt of the Legislature in 1917 to make the rents and revenues from the wife's separate estate, her separate property was unconstitutional both because of a defective caption and because in violation of Article 16, Sec. 15, to the State Constitution was decided on June 10, 1925. This was after the revision of 1925 had been adopted into law. That revision proceeded upon the theory that the provisions of the 1917 amendment adding to the separate estate of each spouse the rents and revenues derived therefrom was constitutional so that, in carrying out its instructions to abbreviate the law where possible, the revision merely provided that the wife should have control of her separate property instead of following more detailed language of earlier amendments.

This provision immediately followed the provision which attempted to make all of the rents and rev-

enues from the wife's separate estate her separate property.

In view of this Legislative history, it seems entirely clear that the revision of 1925 placed the rents and revenues derived from the wife's separate property, and her earnings, under her control, as had been done by the valid portions of the Acts of 1913 and 1917. *Arnold vs. Leonard*, 114 Tex. 535.

Texas Statutes.

REVISED CIVIL STATUTES OF 1925.

TITLE 75. HUSBAND AND WIFE.

Chap. 3.—*Rights of Married Women.*

"Article 4613. *Husband's Separate Property.* All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal."

"Art. 4614. *Wife's Separate Property.* All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, the interest on bonds and notes belonging to her and dividends on stocks owned by her, shall be the separate property of the wife. The wife shall have the sole management, control and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be

necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law."

"Art. 4615. *Compensation for Personal Injuries to Wife.* All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation."

"Art. 4616. *Wife's Separate Property Protected.* Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband."

"Art. 4617. *When Wife May Convey, Etc.* If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder."

"Art. 4618. *Sale of Homestead.* The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint con-

veyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property."

"Art. 4619. *Community Property.* All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only. All the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved."

Art. 4620. *Community Property Liable for Debts.* The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law."

"Art. 4621. *Community Property not Liable.* The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision."

"Art. 4622. *Funds in Bank.* Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be

presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account."

"Art. 4623. *Subject to Debts of Wife.* Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

"Art. 4624. *Judgment and Execution.* Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff."

"Art. 4626. *Application to be feme sole.* Any married woman within this State may, with the consent of and joined by her husband, apply by written petition addressed to the district court of the county in which she may be a bona fide resident for judgment or orders of the said court removing her disabilities of coverture and de-

claring her feme sole for mercantile and trading purposes. Such petition shall set out the causes which make it to the advantage of said married woman to be so declared feme sole, and shall be filed and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her."

Chap. 4. *Divorce.*

"Art. 4634. *Debts Created After Suit.* On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife."

"Art. 4635. *Inventory and Appraisement.* At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction re-

straining him from disposing of any part thereof in any manner."

"Art. 4638. *Division of Property.* The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."

TITLE 48. DESCENT AND DISTRIBUTION.

"Art. 2578. *Community Estate.* Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive."

"Art. 2579. *Passes Charged with Debts.* In every case, the community estate passes charged with the debts against it."

TITLE 129. WILLS.

"Art. 8281. *Who May Execute.* Every person aged twenty-one years or upward, or who may be or may have been lawfully married, being of sound mind, shall have power to make a last will and testament, under the rules and limitations prescribed by law."

"Art. 8282. *May Pass Estate.* Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title and interest in possession, reversion or remainder, which he has, or at the time of his death shall have, of, in or to any lands, tenements, hereditaments or rents charged upon or issuing out of them, or shall have of, in or to any personal property whatever, subject to the limitations prescribed by law."

TITLE 65. FRAUDS AND FRAUDULENT CONVEYANCES.

"Art. 3996. *Conveyance to Defraud.* Every gift, conveyance, assignment, or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

TITLE 122. TAXATION.

Chap. Five. *Inheritance Tax.*

"Art. 7117. *Property Subject.* All property within the jurisdiction of this State, real or personal, corporate or incorporate, and any interest therein, whether belonging to inhabitants of this State or to persons who are not inhabitants, regardless of whether property is located within or without this State, which shall pass absolutely or in trust by will or by the laws of descent or dis-

tribution of this or any other State, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall upon passing to or for the use of any person, corporation or association, be subject to a tax for the benefit of the State's general revenue fund in accordance with the following classifications."

ACTS OF 1927, 40TH LEG.

Control of Community Property by Wife When Husband Disappears.

Chap. 148, page 219:

"*Be It Enacted by the Legislature of the State of Texas*:

"That Article 4619, Chapter 3, of Title 75, of the Revised Civil Statutes of the State of Texas, 1925, shall be and the same is hereby amended so as to hereafter read as follows:

"Section 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall have after such twelve month period and until the husband returns to her and the affidavit

hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

"Sec. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a nonresident of this State at the time of disappearance, or of any county in which the community property or part thereof is situated, in which petition the wife shall set forth the facts entitling her to control, manage and dispose of the community property under the provisions of this article.

"Sec. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

"Sec. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall not be less than ten days prior to such date set for such hearing.

"Sec. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage and dispose of the community property under the provisions of Section 1 of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be recorded in the deed records of other counties in which the property of said community estate may be situated.

"Sec. 6. If any provision or provisions of this Act be held invalid such holding shall not affect the validity of any other provision hereof.

"Sec. 7. The fact that there is now no adequate provision for the management and disposition of community property during the disappearance of the husband, frequently working an intolerable hardship on the wife and depriving her of the fruits and benefits of community property, and resulting in the dissipation and sacrifice of the community estate through the accumulation of taxes and other expenses, and foreclosures, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three separate days in each House be suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."